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DEPARTMENT OF STATE A/CDC/MR
REVIEWED BY J.M. Razi DATE May 6, 1982
XDS [X] or XGDS [ ] EXT. DATE
TS AUTH. REASON(S)
ENDORSE EXISTING MARKINGS [ ]
DECLASSIFIED [✓] RELEASABLE [✓]
RELEASE DENIED [ ]
PA or FOI EXEMPTIONS

FRUS FILES 721
Mrs Mullett

DEPARTMENT OF STATE
WASHINGTON

June 2, 1970

S/S - 7890

Copies To:
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C
S/PC
AF
AF/N
PM
L
H
S/S-S:CMS

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Dear Dave:

I am writing to request your review of the current State/Defense instructions on termination of the USG-Libyan Government Economic Assistance Agreement. Paragraph C of the Agreement provides for the payment of "$1,000,000 per year for each of the calendar years 1965 through 1971." Nevertheless, the State/Defense airgram instructs Ambassador Palmer to inform the Libyan Government that no more payments will be made since the US has in fact overpaid due to termination of our effective use of Wheelus AFB as of November 19, 1969.

The legal merits of this complicated issue have been the subject of differences between our lawyers for some months. Our respective legal offices differ essentially over whether we are legally obligated to pay for our effective use of Wheelus in 1968 and pro rata in 1969, based on Paragraph C of the Economic Assistance Agreement (the State position), or whether the USG has paid more than legally required (the DOD position constructed from the negotiating history). While the Legal Adviser's Office has accepted the DOD position as a plausible legal argument, it believes the more persuasive conclusion is that the timing of the payments, as well as their totality, were in consideration for Wheelus and that the USG is therefore obligated under Paragraph C of the Agreement to pay $1,000,000 for 1968 and $906,840 for 1969 (the pro rata amount through

AID(US) 4 LIB-YAR

The Honorable
David Packard,
Deputy Secretary of Defense.

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AF/N:RSSiddarth

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November 19). This amount could, of course, be offset by any valid claim which we determined to exist and decided to press under international law arising out of early termination of our effective use of Wheelus and other areas at LARG initiative.

The Department is of the view, based on recent consultations with Ambassador Palmer, that submission of the current USG position would not be beneficial to overall USG interests. We believe that it would be difficult to present, inasmuch as it could not be supported by any written understanding with the Libyan Government, and that it would almost certainly become the object of a dispute. One possible LARG reaction would be the demand that unpaid amounts under the Economic Assistance Agreement be offset against the $7,000,000 due the USG under the 1967 F-5 contract. Another reaction would be the contentious filing of claims in connection with Wheelus withdrawal prior to the June 30, 1971 deadline provided in the December 23, 1969 Agreed Minute.

The policy rationale underlying our decision to withdraw from Wheelus AFB was based on our desire to remove an important stumbling block from USG-LARG relations and to develop a fresh start. Having made this basic decision, we believe it important to complete our final withdrawal in a manner which promotes rather than detracts from this objective. Such has been our conduct in other areas of the Wheelus withdrawal. The Libyans have fulfilled their understanding thus far to facilitate our withdrawal. Adherence to our present position would, in our view, be inconsistent with our general policy. Despite uncertainties in our relationship with Libya at this time, and in recognition of the importance of other US interests in that country, we wish to avoid positions on Wheelus, where possible, which we consider likely to adversely affect our overall interests.

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I would therefore appreciate your looking into this matter in the light of the above points and would hope that you could concur in the attached draft telegram which would authorize the Ambassador to acknowledge that we owe $1,906,840 under the Economic Assistance Agreement but reserve our right to present any valid claim we may wish to present under international law and our intention of including this amount in the discussion of other outstanding financial questions in the near future. There is some urgency to this as we should send revised instructions to Ambassador Palmer before the completion of the withdrawal from Wheelus and the termination of the Defense Facilities Agreement which, as you know, is imminent.

Sincerely,

U. Alexis Johnson

Enclosures:
Memorandum of Law
Draft Telegram

Clearances:
PM - Mr. Stoddard (substance)
L - Mr. Rhinelander (draft)
AF/N - Mr. Blake
H - Mr. Leahy

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DEPARTMENT OF STATE

Washington, D.C. 20520

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MEMORANDUM OF LAW

SUBJECT: Termination of Our Economic Assistance Agreement With Libya

Summary Conclusions

Authority to terminate the Economic Assistance Agreement was given to Ambassador Palmer on March 11, 1970, on the basis that both governments understood the assistance to be compensation for base rights and that the United States Government had fulfilled its financial obligations under the Agreement through the end of 1969.

The Legal Adviser's Office considers that although the Economic Assistance Agreement does not refer to base rights, the negotiating history shows that both governments understood United States payments to be in consideration for our use of Wheelus and other areas. While the Legal Adviser's Office considers the present instructions to be based on a plausible legal position, we consider that the more persuasive conclusion, based on the language of the Agreement and the negotiating history, is that the LARG is due under Paragraph C of the Agreement the $1,000,000 payment for 1968 and approximately $900,000 for 1969, i.e., the $1,000,000 payment for 1969 prorated through November 19, 1969.

The Agreement

The Economic Assistance Agreement of 1954 as amended in 1960 provides for the payment through 1971 of $84 million ($39 million from Air Force funds and $45 million from AID funds); an additional $1 million (Air Force funds) was paid during the negotiation of the Agreement. All payments under the Agreement have been made except for four $1 million payments payable (from Air Force funds) in 1968, 1969, 1970 and 1971 under Paragraph C of the Agreement, which provides for the payment of "$1,000,000 per year for each of the calendar years 1965 through 1971.

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The initial point of reference in any dispute as to the rights and obligations of parties to an agreement is the language of the agreement itself. The $1 million payment under Paragraph C of the Agreement for 1968 was not made, apparently due to administrative oversight. This payment would have been made in the normal course in the Spring of 1969, and the 1969 payment under Paragraph C in the Spring of 1970. The words of the Agreement and this pattern of $1 million yearly payments since 1965, undoubtedly have given rise to Libyan expectations that these payments will be forthcoming for 1968 and at least part of 1969.

While the Economic Assistance Agreement does not mention base rights and the Libyans might argue that they should receive payments through 1971 under Paragraph C, we consider that there is ample evidence that both parties in fact understood the fundamental fact that the Agreement represented a quid pro quo for our use of Wheelus. Independently of any documentation, both the Economic Assistance Agreement and the 1954 Defense Facilities Agreement were signed on the same day and the duration of the Economic Assistance Agreement coincides with the earliest date provided in the Defense Facilities Agreement for its termination. The simultaneous signing of the two agreements represented the culmination of years of negotiations on the two interrelated subjects, and this interrelationship was explicitly reiterated in connection with the later negotiations concerning the 1960 amendment increases in the amounts to be paid under Paragraph C of the Economic Assistance Agreement. (We are advised that the present Libyan Government is aware that this was the purpose of the Economic Assistance Agreement.)

This interrelationship would also provide the basis for offset against amounts due the LARG under Paragraph C of the Economic Assistance Agreement of any valid claims which the United States Government might have under international law against the LARG arising out of the early termination, at the initiative of the LARG, of our use of Wheelus and other areas in Libya. The history of our knowledge since 1963 of Libyan desires for early United States withdrawal from Wheelus, and our agreement to the principle of early withdrawal would, of course, be relevant to a determination as to the validity or amount of any United States claims.

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The Negotiating History

The Department of Defense position that the United States has fulfilled its financial obligations through the end of 1969 is based on the theory that there was an understanding of the parties that the $40,000,000 to be paid to the Libyan Government from Air Force funds represented annual "rental" of $2,000,000, and that payments were "accelerated" to $4,000,000 per year in early years. The $4,000,000 which has not been paid, i.e., the $1,000,000 per year for 1968, 1969, 1970 and 1971 under Paragraph C of the Agreement, represents "rentals" only for the years 1970 and 1971. Accordingly, the United States is owed some $183,000 for the period November 19, 1969 until December 23, 1969 (the end of the year as provided in the Defense Facilities Agreement) calculated at the yearly "rental" of $2,000,000.

The negotiating history, however, does not reveal any written understanding of the parties that the $40,000,000 commitment of Air Force funds represented "rental" in the amount of $2,000,000 per year. The negotiating history indicates that a United States Government offer (May, 1954) of $2,000,000 a year for twenty years was considered unsatisfactory by the Libyans.

Our internal memoranda established that the Libyans were told in 1954 that the $40,000,000 in Air Force funds represented the highest commitment which the United States Government could legally make for the twenty-year period, although we were prepared to make an additional $3,000,000 available in the following year from AID funds and would continue to give sympathetic consideration to Libyan economic needs. They also reflect our awareness of Libyan desires to get several development projects underway and our own feeling that "acceleration" of the $2,000,000 a year payments under the prior offer would be the best way of making the offer attractive to the Libyans. While one United States document was given to the Libyans referring to our willingness to expend the $2,000,000 per year "at an accelerated rate" (i.e., $4,000,000 per year in early years and $1,000,000 per year in later years), and a contemporaneous Libyan public statement referred to raising the financial aid "from $1,000,000 to $2,000,000 annually", there is no evidence that either the United States or the Libyan Government intended these short-hand generalities to amend

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the express payment schedule in the agreement. This payment schedule provides for the payment of $7,000,000 initial assistance for 1954 and 1955; $4,000,000 per year from 1955 through 1960; and $1,000,000 per year from 1961 through 1971. (The 1960 Amendment increased the 1960 through 1964 payments to $10,000,000 per year but continued payments of "$1,000,000 per year for each of calendar years 1965 through 1971...") A USG-GOL exchange of telegrams between the signature of the Agreement and its consideration by the Libyan Parliament confirmed the "spacing" of the payments as set forth in the Agreement.

It is, of course, true that both the United States Government and the Libyans considered the $40 million to be consideration for the entire twenty-year period 1952-1971 and that the United States has been deprived of the Base for 1/10 plus of that period. However, it is our view that the value to be ascribed to the use of Wheelus from 1965 through 1971 should be the amount provided in the Agreement to be paid for that period, i.e., $1 million per year, rather than the average yearly figure of $2 million, which does not appear anywhere in the Agreement. While it is plausible to view the $2 million yearly figure as "equitable" on the basis that our operating rights were not to vary from year to year during the twenty-year period, the better legal analysis would appear to be that the timing of the annual payments as specified in the Agreement, as well as the total amount was considered by both governments as consideration for obtaining the use of the Base.

Legal Conclusions

The negotiating history of the 1954 Economic Assistance Agreement and the 1960 amendment does not suggest that either government considered the Agreement to be other than a binding obligation to pay the amounts stipulated, at the rate and for the years provided therein. Accordingly, we consider that the most persuasive conclusion, in light of the negotiating history and language of the Economic Assistance Agreement, is that the LARG is due under Paragraph C of the Agreement the $1,000,000 payment for 1968 and approximately $900,000 for 1969, the $1,000,000 payment for 1960 prorated through

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November 19, the date on which the LARG terminated our effective use of Wheelus by precluding future training.

Concurrence:

L - Mr. Stevenson AF - Mr. Newsom PM/ISO - Mr. Stoddart

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* U.S. GOVERNMENT PRINTING OFFICE: 1969—360-575

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Department of State
TELEGRAM

INDICATE:
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☐ CHARGE TO

DISTRIBUTION

ACTION: Amembassy TRIPOLI

INFO: CINCUSAFE
16 TH AF TORREJON AB
7272 FTW WHEELUS AFB
STATE

SUBJ: Economic Assistance Agreement
REF: CA-1533, March 18, 1970

1. In light your recent consultations this subject, State/Defense have reviewed your instructions.

2. Upon review entire matter we have concluded that negotiating history upon which instructions refair based is plausible legal position but not fully persuasive in light of clear words of Agreement that provide payment of "$1,000,000 per year for each of the calendar years 1965 through 1971..." We believe that words of Agreement and pattern of yearly payments undoubtedly have given rise to LARG expectations that payment will be forthcoming for 1968 and portion of 1969. We further consider that adherence to position contained refair cannot fairly be said to represent meeting of minds, could give rise to serious misunderstanding with LARG which would have adverse effect on US-LARG relations.

DRAFTED BY:	DRAFTING DATE	TEL. EXT.	APPROVED BY:
AF/N:RSStoddarth: L/AF:EVerville:am	5/21/70	21723	J - Ambassador Johnson

CLEARANCES:
Rhinelander
L - Mr XXXXXXXX
DOD
AF - Mr Newsom
AF/N - Mr Blake
PM - Mr Stoddart

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3. We are therefore modifying your instructions as follows: Ambassador Palmer is authorized to reach an oral understanding with the LARG either prior to or after Wheelus turnover that the LARG is due under the Economic Assistance Agreement the $1 million payment for 1968 (which was not made due to administrative oversight) and the $1 million payment for 1969, prorated through November 19, 1969, the date on which the LARG first clearly and unilaterally terminated our effective use of Wheelus by precluding future training. The amount due for 1969 works out to $906,840.

4. You should make clear in reaching understanding para 3 above that we are reserving our legal position with respect to any valid claims we may have resulting from early (November 19, 1969) termination at LARG initiative of our effective use of Wheelus AFB. Reservation of legal position will be included in note signifying final turnover of Wheelus. Exchange of notes on Wheelus

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CLEARANCES:

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ACTION:

turnover should precede exchange of notes on Economic Assistance Agreement. In presenting note set forth below you should explicitly state that US desires actual payment of $1.9 million (as distinct from USG acknowledgement of indebtedness) be included in discussion of outstanding financial questions between two governments in near future.

5. Upon reaching above understandings with LARG and subsequent to exchange of notes signifying Wheelus turnover, Embassy is authorized to present the following note to LARG and to request reply along lines suggested LARG reply note:

USG Note - "I have the honor to refer to recent discussions between representatives of the Embassy of the US of A and the Ministry of Unity and Foreign Affairs of the LAR concerning termination of the Economic Assistance Agreement between the US and Libya dated September 9, 1954, as amended and supplemented by exchanges of notes dated

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CLEARANCES:

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October 30 and November 3, 1954; May 6 and May 30, 1955; May 21, 1959; and June 30, 1960. I wish to confirm the understanding of my Government that this Agreement terminated effective November 19, 1969, it being understood that one million dollars is due for 1968 and the amount due for 1969 will be prorated to November 19, 1969 so that it will be $906,840 and will be the final amount due under the Agreement. My Government will consider this note and your reply concurring therein as constituting an agreement which shall enter into force upon the date of your reply."

LARG NOTE - "I have the honor to refer to your Excellency's note of (date) concerning the termination of the Economic Assistance Agreement between the United States and Libya dated September 9, 1954, as amended and supplemented by exchanges of notes dated ~~September 9~~ October 30 and November 3, 1954; May 6 and May 30, 1955; May 21, 1959; and June 30, 1960 My Government concurs

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in the understanding expressed in your note that this Agreement terminated effective November 19, 1969 and that one million dollars is due for 1968 and the amount due for 1969 will be prorated to November 19, 1969 so that it will be $906,840 and will be the final amount under the Agreement."

6. These instructions supercede CA-1533 which is cancelled except for ad referendum purposes.

END

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CLEARANCES:

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DEPARTMENT OF STATE

Washington, D.C. 20520

Rec'd in S/S 5/30/70

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TO: J - Ambassador Johnson

THROUGH: S/S

FROM: AF - David D. Newsom

SUBJECT: Economic Assistance Agreement - ACTION MEMORANDUM

Summary

We share Ambassador Palmer's views which he expressed to you on his recent trip that the current State/Defense position on the USG-Libyan Economic Assistance Agreement is not based on a persuasive conclusion and would be difficult to present. Moreover, along with Ambassador Palmer, we consider that presentation of this position is likely to become the object of a dispute with the LARG and to have an adverse effect on our bilateral relations with Libya. We believe that a straightforward approach to the LARG, in which we acknowledge that we owe the LARG $1,906,840 under Paragraph C of the Economic Assistance Agreement, but formally reserve our legal position with respect to any valid claim which we might have under international law for early termination of our effective use of Wheelus and other areas at LARG initiative, would be preferable to the present complicated and not very persuasive position. We further believe that it would not be in our overall best interest to press a claim against the LARG at this time for early termination. We could pursue at a later date with the DOD the question of whether we would assert or waive such a claim.

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Discussion

The Legal Position - Paragraph C of the Economic Assistance Agreement provides for the payment of $1,000,000 per year for each of calendar years 1965 through 1971. The last payment made was for calendar year 1967. (The 1968 payment was not made due apparently to administrative oversight, of which we and the Libyans have only recently become aware.) Nevertheless, the current State/Defense instructions, constructed from the negotiating history, are that the USG has fulfilled its obligations under the Agreement and has, in fact, paid more than legally required. This is based on the DOD legal analysis. (Attached is a more detailed Memorandum of Law, Tab C.)

While we accepted the DOD position as a plausible legal argument, we believe the more persuasive conclusion, based on the negotiating history and the language of the Agreement, is that the US is obligated under Paragraph C of the Agreement to pay the Libyan Government $1,000,000 for 1968 and $906,840 for 1969, i.e., the $1,000,000 for 1969 prorated through November 19, the date on which we consider the LARG effectively terminated our use of Wheelus by unilaterally precluding future training.

In view of the interrelationship of the Economic Assistance Agreement and Defense Facilities Agreement, there would, of course, be the possibility of offsetting against the $1,906,840 due the LARG under Paragraph C of the Economic Assistance Agreement any valid claim which the USG might have and decide to press under international law against the LARG arising out of early termination of our effective use of Wheelus and other areas in Libya at LARG initiative.

Apart from our differences of view with DOD as to whether our obligations for 1968 and 1969 have been fulfilled, we believe that the DOD position would be very difficult to present, inasmuch as it could not be supported by any written understanding with the Libyan Government in this regard. In addition, many of the

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USG internal documents relevant to the negotiating history identify the USAF as the source of funds under the Agreement, which the USAF does not wish to disclose.

Since the Economic Assistance Agreement does not refer to base rights, it is, of course, possible that the Libyans will argue that we owe them $1,000,000 per year through 1971 under Paragraph C of the Agreement. Both State and Defense, however, consider that the negotiating history of the Economic Assistance Agreement shows that both Governments understood payments under the Economic Assistance Agreement to be in consideration for base rights. While many of the documents in the negotiating history could not be presented to the Libyans, we believe the circumstances of the simultaneous negotiation, signature and duration of the Economic Assistance Agreement and the Defense Facilities Agreement support this conclusion.

Political Considerations - We consider that presentation of our current position would not be understood but would be rejected by the LARG and could raise problems in our bilateral relations with Libya. The LARG, in a recent diplomatic note, has asked for clarification as to why it has not received payments called for in the Agreement. One possible LARG reaction to the current State/Defense position would be the demand that unpaid amounts under the Economic Assistance Agreement be offset against the $7,000,000 due the USG under the 1967 F-5 contract. Another reaction could be the contentious filing of claims in connection with Wheelus withdrawal. (The Agreed Minute of December 23, 1969 provides that certain types of claims may be filed until June 30, 1971.)

The policy rationale underlying our decision to withdraw from Wheelus AFB was based on our desire to remove an important stumbling block from USG-LARG relations and to develop a fresh start. Having made this basic decision, we believe it important to complete our final withdrawal in a manner which promotes rather than detracts from this objective. Such has been our conduct in other areas of the Wheelus withdrawal, i.e., property turnovers, personnel separations, etc. The

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Libyans have fulfilled their understanding thus far to facilitate our withdrawal and we have no real complaints in this regard. Adherence to our present position would, in our view, be offensive to the Libyans and inconsistent with our general policy.

Despite uncertainties in our relationship with Libya at this time and in recognition of the importance of other US interests in Libya, we would like to avoid where possible positions on Wheelus which we consider likely to adversely affect our overall interests.

As to the possibility of a claim for early termination, the Department of Defense raised the question of reparations last fall and the present State/Defense instructions, which conclude that the USG has overpaid but do not press a claim for overpayment or reparations, represent a compromise between reparations and further obligations under the Economic Assistance Agreement. We consider that we have had use of a valuable base at a very reasonable rate and that the pressing of a claim at this time for early termination would not be in our overall best interest for all of the reasons mentioned above.

We feel that a straightforward approach to the LARG, in which we acknowledge that we owe $1,906,840 under Paragraph C of the Economic Assistance Agreement, but formally reserve our rights to any valid claims we might have under international law, would be preferable to the present complicated but not very persuasive legal position. If we adopt this position, we would be in a position to pursue with DOD at a later date the advantages and disadvantages of making any claim in terms of our total relations with Libya at the time and in any event would review the amount of any claim which we determine to exist.

Recommendations

(1) That you sign the attached letter to Mr. Packard, requesting his agreement to an amendment of the current position on the Economic Assistance Agreement (Tab A).

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(2) That you initial the attached draft telegram, a copy of which will be enclosed with your letter to Mr. Packard. (Tab B).

Attachments:

Tab A - Letter to Mr. Packard
Tab B - Telegram revising instructions on the Economic Assistance Agreement
Tab C - Memorandum of Law
Tab D - CA-1533 Economic Assistance Agreement

Clearances:
PM - Mr. Stoddard (substance)
L - Mr. Rhinelander (draft)
AF/N - Mr. Blake
H - Mr. Leahy

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